

requirements. The ILECs' failure to comply with the Commission's unbundling rules impeded facilities-based competition and investment in new facilities by competitive entrants.

RBOCs have stunted competitive investment by carriers seeking to use unbundled dark fiber by unjustifiably manipulating the Commission's language used in the *UNE Remand Order* to shield significant portions of their deployed dark fiber from availability, particularly claiming that unless the fiber was terminated and spliced at all points it is not "dark fiber." Second, the RBOCs, even when they make UNE dark fiber available, make it unlikely that any CLEC will gain access to the dark fiber UNE by requiring all CLECs to engage in a game of "go fish" in order to determine where that fiber exists and how it may be used.<sup>193</sup>

These forms of discrimination against competitive entrants substantially impede CLEC access to dark fiber that is deployed in the ground and ready to be used once the CLEC invests capital in the equipment necessary to "light" the fiber and provide service. In order to foster further investment in telecommunications facilities, the Commission should make clear to ILECs that its rules require (1) unbundled access to dark fiber regardless of whether it is spliced and/or terminated and (2) that ILECs must provide CLECs nondiscriminatory access to information regarding the location of dark fiber, including maps and other sources of data, that allow CLECs to make independent judgments about the suitability of the elements to provide the services it seeks to offer.<sup>194</sup> Clarification of such rules in this manner is necessary not only to foster investment and innovation by competitors that will seek to use the element of the ILEC network that is most difficult to duplicate, the transmission facility, to provide service, but is also required

---

<sup>193</sup> Conversent comments at Ex. 1 Graham Declaration ¶ 33 (April 5, 2002).

<sup>194</sup> UNE Remand Order at ¶ 427.

under the core principles of nondiscrimination embodied in the 1996 Act.<sup>195</sup> Several state Commissions, responding to the real-world practices of the RBOCs, have imposed such requirements on ILECs; the Commission should adopt these best practices as national rules regarding nondiscriminatory access to UNE dark fiber.

The Dark Fiber Commenters' proposals are based on both their own experience in ordering and deploying dark fiber UNEs, and also on state commission decisions that were made after presentation of witness testimony provided under oath and subject to cross examination. In turn, the experience of the Dark Fiber Commenters enables them to understand how RBOCs use fiber in their own networks and how they activate dark fiber for their own use. Thus, these clarifications that the Dark Fiber Commenters propose would eliminate many loopholes that RBOCs have been exploiting in order to avoid their legal obligation to provide nondiscriminatory access to the dark fiber UNEs.

Likewise, each of these proposals is critical to making access to the dark fiber UNE meaningful. Without parity splicing for CLECs, much of the dark fiber in an RBOC network will remain unavailable and unused, and without access to information, CLECs have no way of knowing whether fiber exists and will typically lose a customer before they "guess" where it is.

**A. ILECs Must Provide Unbundled Access to Unspliced and Unterminated Fiber on a Nondiscriminatory Basis**

It is clearly apparent from CLEC experience attempting to use dark fiber UNEs that the RBOC will exploit every ambiguity in the Commission's rules to deny and limit access to the dark fiber UNE.<sup>196</sup> One such significant "loophole" that the RBOCs have concocted and then

---

<sup>195</sup> 47 U.S.C. § 251(c)(3). Verizon v. FCC at 63.

<sup>196</sup> Sprint comments at 28.

used to deny access to UNE dark fiber is based upon the Commission's statements regarding dark fiber in the *UNE Remand Order* that "dark fiber is physically connected to facilities"<sup>197</sup> and that dark fiber is "fiber optic cable connecting within two points within the incumbent ILEC's network."<sup>198</sup> Using this language from the *UNE Remand Order* as a pretense, the RBOCs have "refused to run the connections between fiber patch panels [termination] or to make routine fusion splices – something they have dedicated splicing crews do every day to bring their own fiber into service."<sup>199</sup>

SBC, for example, has used this language as a blunt instrument, to deny EPN and other CLECs access to fiber that is not actually spliced or terminated at both ends. As the Dark Fiber Commenters explained in initial comments, ILECs regularly deploy fiber in segments with planned "breaks" in the path.<sup>200</sup> These planned breaks also occur at points where larger backbone cable meet smaller distribution or lateral cables that connect to specific customer locations or remote terminals.<sup>201</sup> In order to build maximum flexibility in how it uses its deployed fiber, the ILEC will place splice cases at these mid-span breaks. At these splice cases the ILEC can splice strands of fiber together in order to complete a path from one location (usually an ILEC central office) to another location, (usually a customer premises, remote terminal or with interoffice fiber another central office).<sup>202</sup> deployed fiber is also frequently left unconnected

---

<sup>197</sup> UNE Remand Order ¶ 174 n. 323.

<sup>198</sup> Id. at ¶ 318 n. 628.

<sup>199</sup> Sprint comments at 28.

<sup>200</sup> Joint Comments of El Paso Networks, CTC Communications, ConEd Communications, CC Dkt. No. 01-338, 96-98, 98-147, filed April 5, 2002, ("Dark Fiber Comments"), at Ex. 5, Testimony of R. Passmore, p. 6.

<sup>201</sup> Id. at p. 7.

<sup>202</sup> Id. at 6-7, 11.

when that fiber path ends at a customer premises or remote terminal.<sup>203</sup> When there is additional demand for that fiber at the same premises (or remote terminal) additional fiber will be terminated. The function of termination actually involves a splice.<sup>204</sup> The main difference between splicing and termination of fiber is that splicing usually occurs in a manhole or aerial splice case, while termination occurs inside a building.<sup>205</sup>

**1. Unspliced and Unterminated fiber is Installed Fiber and is Connected to the ILEC network**

SBC has argued before state Commissions in California, Indiana and Texas, that because un-terminated fiber is not connected to equipment at the customer location at the termination point it need not be unbundled. The California Public Utilities Commission ("California PUC") rejected SBC's contention noting that it "is an attempt to define away its legal obligations"<sup>206</sup> and that the California PUC did "not want to set a rule in place that would allow [SBC] to evade its obligations to unbundle dark fiber for CLECs, as mandated by the FCC."<sup>207</sup> Likewise, SBC made similar assertions with a similar result before the Texas Public Utilities Commission ("Texas PUC").<sup>208</sup>

---

<sup>203</sup> Dark Fiber Comments, Ex. 8 Townes Rebuttal Testimony at p. 1.

<sup>204</sup> Dark Fiber Comments, Ex. 12 Declaration of Patricia Hogue at 2. ("ILECs routinely perform a fusion splice to connect a fiber pigtail to a fiber cable in a splice tray.")

<sup>205</sup> Id. at 2-3.

<sup>206</sup> Application by Pacific Bell Telephone Company (U 1001 C) for Arbitration of an Interconnection Agreement with MCImetro Access Transmission Services, L.L.C. (U 5253 C) Pursuant to Section 252(b) of the Telecommunications Act of 1996, A.01-01-010, Final Arbitrator's report Cal. PUC, July 16, 2001 at 129.

<sup>207</sup> Id. at 130.

<sup>208</sup> It is important to note that SBC in Texas asserted that un-terminated fiber was excluded from the definition of dark fiber because of the FCC's language in the UNE Remand, while in arbitration proceedings with EPN's predecessor company Waller Creek Communications, SWBT agreed to include both un-spliced and un-terminated fiber in its definition of dark fiber. Petition of Waller Creek Communications for Arbitration of an Interconnection Agreement Pursuant to Section 252 of the Telecommunications Act of 1996 with Southwestern Bell Telephone Company, Docket 17922, Complaint of Waller Creek Communications for Post-Interconnection

The Texas PUC found:

that SWBT incorrectly interprets the FCC's intention. SWBT states that, consistent with the FCC's mandate in Paragraph 328, it is only obligated to provide dark fiber as a UNE if the fiber connects two points in SWBT's network. The Arbitrators, however, agree with CoServ's argument that "connectivity does not equal termination." Consequently, the Arbitrators find that the *UNE Remand Order* discussed connectivity in the context of distinguishing dark fiber that was already "in place and called into service" from the example of unused copper wire "stored in a spool in a warehouse."<sup>209</sup>

The *UNE Remand Order* describes its connection standard as meaning that the fiber is "in place."<sup>210</sup> Even if a strand is not spliced, it is still "in place." The fact that the fiber strand is not yet spliced at certain points no more renders it "unconnected" to the SWBT network than does the fact that a strand is not yet terminated. Like unterminated fibers, fibers that have been deployed in cables but not yet spliced are within the FCC's definition of unbundled dark fiber.

Whether or not a loop has been spliced or not does not change the fact that the fiber cable is connected to SWBT's network and is easily called into service; therefore, both spliced and unspliced dark fiber fit within the FCC's definition of dark fiber UNEs, just as unspliced and unterminated copper dead count falls within the definition of unbundled loops.

The FCC identified physical connection to the incumbent's network as a basic threshold to clarify that ILECs were not required to unbundle undeployed, warehoused network elements. To illustrate this measure, the FCC distinguished between copper wire stored in a warehouse, which is not a UNE because it is not easily called into service, and copper "dead count" loops,

---

Agreement Dispute Resolution with Southwestern Bell Telephone Company, Docket 20268, Hearing Tr. at. 445-449, 789, 1332-1353, TX PUC (April 9, 12-13, 1999) provided as Attachment D.

<sup>209</sup> Docket 23396, Petition of CoServ, Inc. for Interconnection Agreement with SWBT, Arbitration Award at 113-114, TX PUC, April 17, 2001.

<sup>210</sup> UNE Remand Order ¶ 174.

which are UNEs because they have been already installed in the field and are easily called into service.<sup>211</sup>

Under this standard, it is clear that un-spliced or un-terminated dark fibers have been deployed and are connected to the ILEC network. This fiber is not lying idle on a spool in a warehouse. Rather, extensive funds have been spent to secure rights of way, dig up city streets, lay the conduit and fiber along the proper path to the respective customer premise or central office, close up the trenches and re-pave the city streets. This fiber is deployed, in-place fiber. Further, the dark fiber segments are connected to ILEC network through the cables and conduit in which they are deployed in the ground or on telephone poles.<sup>212</sup> These cables and conduits, traversing the ILEC rights-of-way, are connected to ILEC facilities, such as ILEC owned wire centers and other terminals, and to each other at ILEC -owned splice cases in manholes and other locations.<sup>213</sup> The individual fiber strands meet at the inside of a small box, the splice case, where they are exposed so that they can be easily spliced to any number of other strands. The ILEC will have undertaken significant expense to place these fibers in their present location, so that, as SBC itself admits, the facilities would be ready to be used when needed to provide service. SBC explained that its “goal is to have facilities in place when a customer places a service order.”<sup>214</sup> Deployment of fiber facilities in these cables and conduits was an expensive endeavor that was undertaken so that the facilities would be in place, physically connected to the ILEC network, as needed, and could easily be called into service. Clearly, these dark fiber facilities are not

---

<sup>211</sup> UNE Remand Order ¶ 325.

<sup>212</sup> Dark Fiber Comments, Ex. 5, Passmore Direct at 13..

<sup>213</sup> Id.

<sup>214</sup> Petition of El Paso Networks, LLC for Arbitration of an interconnection Agreement with Southwestern Bell, Docket No. 25188, (“EPN Texas Arbitration”) SWBT Weydeck Rebuttal Testimony, at 43, ln. 4-5, TX PUC, (March 28, 2002). (“Weydeck Rebuttal”)

comparable to spools of copper wire in a warehouse. They are installed facilities, considered by SBC to be available for use for its own retail services.

**2. Un-spliced and Un-terminated Fiber is Easily Called into Service**

The second standard for unbundled dark fiber is that it should be able to be easily called into service. Because the splicing process is routine and is performed by legions of RBOC trained full-time splicing specialists, unspliced fiber is easily called into service. As described below, the most obvious evidence that unspliced fibers can be easily called into service is the fact that RBOCs perform thousands of fiber splices for their own use. Indeed, their chosen deployment method is to rely on splicing to call the fiber into service. In addition, the fiber splicing process is mechanically nearly identical to copper splicing, which ILECs are regularly required to perform for CLECs, such as in providing xDSL loop conditioning. For example, SBC performed approximately 300 fiber splices for EPN, apparently without experiencing any difficulty, before it began to refuse to provision UNEs for which splicing is required. Finally, SBC is also required to splice dark fiber in Indiana and Ohio, and other ILECs perform splicing for CLECs in other states.

With respect to splicing dark fiber, EPN spent significant resources arbitrating this issue before the Texas Commission. In defense of its position that un-spliced fiber was not available as UNE dark fiber, SBC repeated the same argument that the Texas Commission squarely rejected regarding un-terminated fiber.

EPN presented considerable persuasive evidence from its employees, many whom had 20 or more years of experience splicing fiber for SBC, that splicing fiber was an activity they performed every day at SBC in order to bring fiber into service for SBC's own customers. EPN also offered deposition testimony of a current SBC splicing technician in Texas that likewise

demonstrated that SBC plans for splicing when it deploys fiber in its outside plant, trains its technicians to splice fiber, and deploys many crews of employees throughout the state of Texas whose single purpose in the company is to splice fiber on a daily basis as a matter of routine.

EPN presented additional testimony explaining that splicing was a necessary and routine function due to the manner in which SBC deploys fiber in its network, leaving fiber deployed but un-spliced until it is needed to bring a customer into service. SBC admitted that it deploys un-spliced fiber in its network and that it splices this fiber when it needs additional fiber for its own needs.<sup>215</sup> Indeed, *every* witness who addressed this question agreed that SBC normally does not splice most of its loop fiber until the fiber will be called into service, but instead leaves the remaining fibers unterminated and unspliced for future use.<sup>216</sup> For example, Mr. Tijerina of SBC testified that “We splice what’s necessary for what they’re working on at the time” and that SBC would splice the fiber later if needed to provide additional services.<sup>217</sup> Mr. Tijerina, who has 26 years of experience splicing fibers for SBC, most recently as the foreman of the nine person fiber splicing crew for North Dallas,<sup>218</sup> further confirmed that as a result of this practice, most of the unused fibers out in the field are unspliced, but that whenever SWBT needs a fiber, it will splice the fiber and create end to end connectivity for its customer.<sup>219</sup> And Ms. Rossman, Manager, Design Engineer for SBC in Richardson, Texas, explained that “we usually splice the fibers that are needed” to meet current need or imminent projected demand,<sup>220</sup> while other fibers remain

---

<sup>215</sup> Weydeck Rebuttal, at 42, ln. 23; Id.. at 43, ln. 1-5.

<sup>216</sup> EPN Texas Arbitration Hearing Transcript at 535, ln. 10-13. Relevant excerpts provided as Attachment E.

<sup>217</sup> Johnson deposition at 165:13-24, 166, ln. 21 to 167, ln. 4, provided as Attachment F.

<sup>218</sup> Tijerina Deposition, at 13, ln. 21-22; Id. at 14, ln. 24-26, provided as Attachment G.

<sup>219</sup> Tijerina Deposition, at 93, ln. 1-4.

<sup>220</sup> Rossman Deposition, at 79, ln. 11-12; Id. at 80, ln. 2-4, provided as Attachment H.



unspliced “for future use, so you can deploy them where needed.”<sup>221</sup> SBC clearly acknowledged that it would perform new splices “if there was a reason to splice additional cable as we had another [customer or service].”<sup>222</sup>

The Dark Fiber Commenters do not object to this engineering philosophy which preserves flexibility in deployed plant, provided that the ILEC does not use this engineering philosophy to evade its legal obligation to provide CLECs with unbundled access to dark fiber. As the Texas PUC ultimately determined, there is “no reason why this particular [SBC] business policy should translate into a means by which [SBC] can effectively reserve all of the un-spliced dark fiber for its own use.”<sup>223</sup>

Whether or not a loop has been spliced does not change the fact that the fiber cable is connected to SWBT’s network and is easily called into service; therefore, both spliced and unspliced dark fiber fit within the Commission’s definition of dark fiber UNEs, just as unspliced and unterminated copper dead count falls within the definition of unbundled loops.

The Commission should adopt the best practices developed by state commissions around the country and incorporate their findings into its national rules. For example, the Texas Commission recently ruled that “unterminated and unspliced fibers should be made available to [the CLEC] for use as UNE dark fiber,”<sup>224</sup> and that “[SBC] has an obligation to provide that unspliced UNE dark fiber to [the CLEC] and splice it upon request.”<sup>225</sup> The Texas PUC explained its decision by noting that it found “no reason to distinguish between fiber that is

---

<sup>221</sup> Rossman Deposition, at 81, ln. 7-18.

<sup>222</sup> EPN Texas Arbitration Hearing Transcript. at 534, ln. 23.

<sup>223</sup> Petition of El Paso Networks, LLC for Arbitration of an interconnection Agreement with Southwestern Bell, Docket No. 25188, Arbitration Award, July 1, 2002, TX PUC, at 139 (“EPN Texas Arbitration Award”).

<sup>224</sup> Id. at 138.

deployed and spliced and fiber that is deployed and un-spliced; doing so would limit EPN's ability to request UNE dark fiber."<sup>226</sup>

### 3. Splicing Does Not Involve Construction

The RBOCs further contend that they should not be compelled to splice dark fiber UNEs for CLECs because they are not required to "construct" UNEs for CLECs. Of course it seems that the RBOCs sing this tired refrain every time CLECs request nondiscriminatory access to UNEs. The ILECs cried they were not obligated to condition loops, claiming it too was a construction activity.<sup>227</sup>

The Commission wisely rejected that argument before and should reject it again in the context of dark fiber. First, the argument has no legal basis and second, state commissions have soundly rejected the argument that splicing is construction.

The purported source of this RBOC mantra is of course language from the *Local Competition Order* and the *UNE Remand Order* that in typical RBOC fashion has been distorted far beyond any credible meaning. In the *Local Competition Order* the FCC addressed small ILEC concerns by noting that "in this section, for example, [the Commission] expressly limit[s] the provision of unbundled interoffice facilities to *existing* incumbent LEC facilities."<sup>228</sup> This sentence appeared under the FCC's discussion of interoffice transport only.

In the *UNE Remand Order*, the Commission again discussed the ILEC obligation to provide CLECs unbundled access to interoffice transport and noted that it does "not require incumbent LECs to construct new transport facilities to meet specific competitive LEC point-to-

---

<sup>225</sup> Id. at 139.

<sup>226</sup> Id.

<sup>227</sup> UNE Remand Order at ¶ 173.

point demand requirements for facilities that the incumbent LEC has not deployed for its own use.”<sup>229</sup>

At no point did the Commission address precisely what it meant by the term “construction.” In the context of loop conditioning, however, the Commission rejected GTE’s argument that loop conditioning involved providing superior access to UNE.<sup>230</sup> Instead, the FCC established that loop conditioning is a modification of the ILEC network needed to accommodate unbundled access to the loop, consistent with Section 251(c)3 and the Eighth Circuit Iowa Utilities I opinion.<sup>231</sup>

The Texas Commission has also effectively rejected SBC’s construction argument, and required SWBT to unbundle dark fiber even if the fibers required termination or splicing before they could be lit, holding that “terminating dark fiber does not constitute constructing new transport facilities.”<sup>232</sup> Importantly, termination by its very nature requires splicing, and the engineering work required is essentially the same. SBC has testified that, “First of all, to terminate fiber, you have to splice it. You have to splice fibers together.”<sup>233</sup> The only material difference between termination splicing and splicing of mid-span breaks is that termination is usually done at a customer’s premises or central office, not in SBC’s outside plant; splices in a manhole, for instance, may require somewhat more time and effort to access the fiber. But this is merely a difference in degree that does not affect the essential similarity of the two tasks. Both

---

<sup>228</sup> First Local Competition Order ¶ 451.

<sup>229</sup> UNE Remand Order ¶ 324.

<sup>230</sup> UNE Remand Order ¶ 173

<sup>231</sup> Id.

<sup>232</sup> Texas PUC CoServ Award at 114.

acts require exactly the same type of splicing.<sup>234</sup> Similarly, a splicing requirement does not require SWBT to construct superior quality loops or transport for EPN; as discussed, in such event, the relevant fiber has already been constructed.

Splicing does not require deployment of any new capital facilities, nor does it involve any construction.<sup>235</sup> Splicing is a routine engineering activity that requires only a short time to complete,<sup>236</sup> and uses only existing network capital facilities. Therefore, splicing performed on existing fiber does not render the facility a new network element that did not previously exist.

The Texas Commission soundly rejected SBC's "new construction" argument in finding that:

SWBT argues that it is not required to construct facilities as a result of terminating fiber for CoServ. The Arbitrators find that terminating dark fiber does not constitute constructing new transport facilities. The UNE Remand Order addresses the issue of constructing additional facilities in the context of meeting a requesting carrier's requirements where the ILEC has not deployed transport facilities for its own use. The Arbitrators find that CoServ is not asking for SWBT to construct additional facilities. CoServ is only asking for access to dark fiber in those facilities that SWBT has already deployed.<sup>237</sup>

For the purposes of this argument, the terminations at issue are the same as the splices at issue here. New splices do not represent the construction of new network elements any more than new terminations. Splicing, like termination, is merely a simple engineering fusion procedure that is needed to establish end-to-end connectivity so that a circuit can be lit.<sup>238</sup>

---

<sup>233</sup> Petition of CoServ et al for Arbitration of an interconnection Agreement with Southwestern Bell, Docket No. 23396, ("EPN Texas Arbitration Award Hearing Transcript Cross Examination. of T. Oyer (SWBT), at 198.

<sup>234</sup> Dark Fiber Comments Ex. 7, at 15, 16.

<sup>235</sup> Dark fiber Comments Ex. 5 at 17, 18.

<sup>236</sup> EPN Texas Arbitration Award at 129.

<sup>237</sup> Texas PUC CoServ Award, at 114.

<sup>238</sup> Dark Fiber Comments, Ex. 5, at 7, 14 Passmore Direct.

When presented with SBC's claim that splicing involved construction, the Texas PUC rejected that claim as well. The Texas PUC did not "believe that obligating SWBT to provide UNE dark fiber as described above would require SWBT to construct dark fiber for EPN for use as a UNE."<sup>239</sup> In explaining its reasoning the Texas PUC stated that "EPN is similarly not asking SWBT to construct additional facilities. EPN is only asking for access to fiber that is already there."<sup>240</sup>

As a result the Arbitrators in Texas agreed with EPN that un-spliced fiber must be made available as UNE dark fiber and the SBC must splice such fiber when CLECs request it.<sup>241</sup>

Other state commissions have considered and rejected SBC's argument that it is not required to provide a network element as a UNE where the ILEC must engage in engineering activities to do so. Ameritech had contended that loops are not available as UNEs unless all of "the required components already exist in a fully connected fashion."<sup>242</sup> The Illinois and Michigan commissions both rejected Ameritech's cramped view of its unbundling obligations, finding that Ameritech was required to provide the loop as a UNE even if this required some incidental engineering work activity. The ICC stated:

Ameritech's current definition [of "available"] does not provide (1) adequate parameters for determining in advance whether a UNE will be available and (2) a sufficient safeguard against discriminatory implementation. Under Ameritech's definition, a CLEC will not know if a UNE is available until it is told so by Ameritech. With regard to Ameritech's contention that its definition is consistent with the Eighth Circuit's determination that it is only obligated to provide unbundled access to its existing

---

<sup>239</sup> EPN Texas Arbitration Award at 133.

<sup>240</sup> Id.

<sup>241</sup> Id.

<sup>242</sup> BRE Communications, L.L.C., d/b/a Phone Michigan v. Ameritech, Opinion and Order, Case No. U-11735, <http://cis.state.mi.us/mpsc/orders/comm/1999/u-11735.pdf>, p. 8 (Mich. PSC February 9, 1999) ("MPSC Order"); Illinois Bell Telephone Company, Investigation of Construction Charges, Order, 99-0593, ICC August 15, 2000), <http://www.icc.state.il.us/icc/tc/doc/000822sbc.pdf> ("ICC Order").

network, the Commission agrees with [CLECs] that the evidence presented indicates that CLECs have not sought access to a new or superior network, but only access to the network that Ameritech presently owns and manages on a nondiscriminatory basis.”<sup>243</sup>

Both the Michigan and Illinois commissions also found that Ameritech was required to treat CLECs in the same manner as its own retail customers. The Michigan PSC rejected Ameritech’s view “that it is not required to treat CLECs in the same manner as it treats retail customers.”<sup>244</sup> The Michigan PSC stated that if Ameritech’s “description of nondiscriminatory treatment were to be adopted, Ameritech Michigan would be free to treat all CLECs in an anticompetitive manner so long as it applies such treatment equally to all CLECs, irrespective of how it treats itself or its end-user customers.”<sup>245</sup> Similarly, the ICC rejected Ameritech’s view to the effect that “so long as Ameritech provides UNEs to all CLECs, itself, and its affiliates on the same terms, it does not matter how Ameritech treats and recovers its costs from its retail end users for the same activity.”<sup>246</sup> Both state commissions required Ameritech to modify loops essentially anywhere within its existing network and prohibited Ameritech from imposing special charges in certain respects when Ameritech determines that it cannot provide a requested UNE without construction activities.

Even if the Commission’s language in the *UNE Remand Order* stood for the proposition that construction of UNEs is not required, the Supreme Court Opinion in *Verizon* ends the discussion with respect to splicing and other types of activity that the ILEC must undertake in order to afford CLECs access to UNEs. In *Verizon*, the Court described in no uncertain terms

---

<sup>243</sup> ICC Order, at 20.

<sup>244</sup> MPSC Order, at 11.

<sup>245</sup> MPSC Order, at 29.

<sup>246</sup> ICC Order, at 97.

that access to UNEs is predicated on a requirement of nondiscrimination.<sup>247</sup> Thus the Court affirmed the FCC's rules requiring ILECs to furnish CLECs combinations of UNEs that are ordinarily combined in the ILEC network.

The Court went further, affirming the remainder of the FCC's rules that require the ILEC to make new combinations, even when the ILEC does not ordinarily make those combinations for itself, given that it would be anti-competitive to impose unnecessary connection costs on the CLEC when it was more efficient for the ILEC to perform the connection and charge the CLEC a cost based rate for that function.<sup>248</sup> The Court recognized that the Act "proceeds on the understanding that incumbent monopolists and contending competitors are unequal".<sup>249</sup> Based upon that recognition, the Court held that section 251(c)(3) does not allow the ILEC to sit idly by requiring CLECs to combine UNEs that the CLEC is unable to combine.<sup>250</sup>

Further, *Verizon* also stands for the proposition that the ILEC can not simply provide a UNE without performing the minimal amount of work to allow the CLEC to use the UNE. The Court in *Verizon* concluded that it "hardly seems unreasonable, then, to require the incumbent to make the combination, for which it will be entitled to a reasonable fee; otherwise, an entrant would not enjoy true nondiscriminatory access notwithstanding the bare provision on an unbundled basis of the network elements it needs to provide a service."<sup>251</sup> The Court thus recognized that "the bare provision" of a UNE a CLEC needs to provide service, without the ILEC performing additional functions, may not be enough to satisfy the statutory command that

---

<sup>247</sup> *Verizon v. FCC*, slip op. at 16, 68.

<sup>248</sup> *Id.* at 68.

<sup>249</sup> *Id.* at 63.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 68.

ILECs provide UNEs on an unbundled basis. In such instances, the ILEC must perform some work to comply with the Act. In the case of UNE dark fiber this would mean splicing and terminating the UNE dark fiber.<sup>252</sup>

**4. Fiber Splicing Does Not Pose any Undue Risk to the ILEC Network or its Users**

Splicing at existing splice cases performed by authorized SBC technicians does not pose an unreasonable or significant risk of damaging the network or causing service outages to other users. SBC has skilled technicians, who open existing splice cases and perform splicing on fibers inside these cases on a daily basis, and has methods and procedures in place to avoid any undue risk to the network.<sup>253</sup> The risk of damage does not dissuade SBC from performing splices needed to enable SBC to serve its retail customers, and should likewise not be a basis for SBC to discriminate against CLECs by refusing to provide splicing to them. SBC routinely opens splice cases to splice fibers for its own use even where there are adjacent lit services within the same cable.<sup>254</sup> SBC's Mr. Tijerina estimated that 80% of the splices in North Dallas were performed in cables that have other lit fibers within.<sup>255</sup> This makes complete sense, given SBC's "splice for new customers" policy. Once the original fibers are spliced in the splice case for SBC's original customers, every new SBC customer will create the need for SBC splicers to reopen the splice case and splice additional dark fiber next to the working fibers. By its own testimony, this is the process SBC has designed for itself on a day-in, day-out basis.

---

<sup>252</sup> See id. at 68.

<sup>253</sup> Dark Fiber Comments Ex. 5 Passmore Direct, at 20-.

<sup>254</sup> Id. at 21.

<sup>255</sup> Tijerina Deposition, at 57, ln. 24-25; Id. at 58, ln. 1-2.



SBC's extensive splicing training program includes training for performance of splicing on dark fibers within cables that also have lit fibers in the same cable, so as to avoid damaging or disconnecting working fibers.<sup>256</sup> The splicing at issue only affects *dark* fiber, so there is no interruption to the fibers in the cable or sheath that may be lit. SBC splicing technicians use special equipment designed specifically for performing splicing without undue risk to the lit fibers.<sup>257</sup> Despite the minimal risk, SBC performs this splicing only between the hours of midnight and 6 A.M. to further minimize any impact to existing services.<sup>258</sup> In the North Dallas splicing crew supervised by Mr. Tijerina, some splicers work only at night, and spend the majority of their time, week in and week out, splicing dead count fiber along loop backbones, where the working and "dead" fibers sit side by side in a splice case.<sup>259</sup> Mr. Passmore of EPN testified that, "when I supervised SBC's splicing team in the Houston area, splices were performed on a daily basis, and there were no instances in which I can recall that any facilities were damaged. I do not recall a single instance in which a lit service was disrupted due to splicing activity on a separate, dark fiber." Similarly, Mr. Tijerina estimated that in his 29 years of splicing for SBC, he cut a working fiber by accident about five times. He explained, however, that in those few cases he was able to repair the fiber and have everything back to normal within fifteen to twenty minutes.<sup>260</sup> In the decades of SBC splicing experience encompassed by the experience of these two individuals, less than two hours of off-peak service time has been lost,

---

<sup>256</sup> Tijerina Deposition, at 51, ln. 16-20.

<sup>257</sup> Dark Fiber Comments, Ex. 5 Passmore Direct, at 21.

<sup>258</sup> EPN Texas Arbitration Hearing Tr. at 510, ln. 25; Tr. at 511, ln. 1.

<sup>259</sup> Tijerina Deposition, at 64, ln. 8-25; 65, ln. 1-25; 66, ln. 1-9.

<sup>260</sup> Id. at 69, ln. 5-13. Mr. Tijerina further explained that these accidental cuttings did not occur when he was opening an existing splice case, rather it happened when Mr. Tijerina was using a knife to cut open the outer protective coating of a previously un-broken fiber cable to install a new splice case.

while their splices have enabled new services to be provisioned to thousands of Texas businesses and consumers.

SBC experiences no difficulty in selecting the correct fibers when it performs splicing for its own needs. As Mr. Tijerina explained, fibers are labeled and color-coded so that the splicer knows which ones are lit and which are to be spliced.<sup>261</sup> Fibers currently in use for lit services are clearly identifiable, and splicing poses no material risk that these lit fibers would be cut or service to existing customers disrupted.<sup>262</sup>

The fact that the Dark Fiber Commenters seek only the right to have splices performed on the same terms that ILECs make available to themselves is significant, not only because ILECs are required to provide UNEs to CLECs on terms “no less favorable to the requesting carrier than the terms and conditions under [SWBT] provides such elements to itself,”<sup>263</sup> but because the ILEC’s own performance of splicing for itself undermines the credibility of its assertions that splicing poses significant risk of network harm. As the D.C. Public Service Commission explained:

The [DC PSC] determines that Verizon did not meet its burden of proving that it was technically infeasible. While Verizon did present evidence that reopening splice cases could potentially harm the fiber inside, Verizon admitted that it did reopen splice cases on occasion. This reopening activity by Verizon demonstrates that Verizon has determined that in some circumstances, the benefits to Verizon’s deployment of network architecture outweigh the possible negative effects on the network. If Verizon performs this work for itself, then Verizon should be able to provide it for competitors.<sup>264</sup>

There is no basis for concern that EPN would request splicing of fiber so frequently as to pose an undue risk of network damage. The record from EPN’s Arbitration with SBC in Texas

---

<sup>261</sup> Id. at 74, ln. 5-6.

<sup>262</sup> Id. at ln. 5; 75, ln. 19.

<sup>263</sup> 47 C.F.R. § 51.313.

<sup>264</sup> District of Columbia Yipes Arbitration Award at ¶ 26, 67.

demonstrates that SBC technicians open splice cases on a frequent and routine basis, as dictated by customer demand.<sup>265</sup> Where SBC has in the past made splicing available to CLECs, including for EPN in Texas, and in states where ILECs are required to provide splicing, no evidence has been offered that CLEC splicing rights have generated any significant increase in splicing activity, much less an increase that would pose an undue increase in the risk of damage to the network.<sup>266</sup>

Splice cases are specially designed to allow multiple, repeated entries for the purpose of performing splicing, repair, testing or other activities. Mr. Tijerina explained that there is no limit to the number of times a splice case could be opened; that they could be opened every day, if needed, and that he is not aware of any instances in which a splice case had to be replaced because of wear and tear from frequent re-entry.<sup>267</sup> Each fiber strand is initially provisioned with 50-100 feet of excess coil.<sup>268</sup> Since only a few inches at most are needed to perform each new splice, there is no demonstrated risk that fiber strands will break or be exhausted by splicing activity.

The reasonableness of EPN's proposal is further highlighted by the evidence that SBC engages in other forms of splicing for itself that pose greater network risk than the splicing proposed by EPN. SBC frequently will splice a new fiber into an existing fiber where no splice case previously existed. Although its risks are still manageable, this type of splicing activity

---

<sup>265</sup> Similarly, other arbitration proceedings established the fact that other ILECs perform the same function on a daily basis as well. See *Id.*

<sup>266</sup> Since most new optical services for any carrier would require splicing, the future splicing needs of carriers should be roughly in proportion to their share of the optical telecommunications market.

<sup>267</sup> Tijerina Deposition at 32.

<sup>268</sup> EPN Texas Arbitration Hearing Tr. at 509, ln. 20 (Weydeck Cross); Tijerina Deposition at 32, ln. 12-18.

poses far more risk to the existing fibers, because the SBC technician must use a knife to shear away the protective coating of the fiber cable in order to expose the fibers, so that a new splice case can be installed and the new cable spliced into existing strands as needed, while trying not to accidentally cut through the strands. Mr. Tijerina acknowledges that he has established hundreds of new splice points by cutting into a sheath with a knife.<sup>269</sup> SBC also will regularly break old splices to provision a new service over a different route. Mr. Tijerina explained that SBC performs this activity on a weekly basis in North Dallas.<sup>270</sup> SBC technicians attend SBC-run training schools before they are permitted to splice copper and fiber in SBC's network. These schools run for five weeks, forty hours per week. At the school, technicians receive instruction on the procedures for how to safely set up a manhole, open cases, and perform splicing without harming the network. Then in their first month, they get actual field experience going out with another experienced splicer.<sup>271</sup> Splicers then cement their expertise through real-world experience, as splicing crews in at least the major cities perform splicing as their primary job responsibility, full-time.<sup>272</sup>

The FCC should take this opportunity to clarify its rules and eliminate the confusion that the RBOCs have perpetuated, and affirm that the ILECs must provide unbundled access to fiber that is in the ground but hasn't been spliced to other fiber or terminated in a building to provide service in the future.

---

<sup>269</sup> Tijerina Deposition, at 68, ln. 17-25; Id. at 69, ln. 1-23 .

<sup>270</sup> Id., at 98, ln. 14-21.

<sup>271</sup> Id., at 15, ln. 14-25; Id. at 16, ln. 1-25; Passmore Redirect at 17, ln. 1-2, 9-25 Tijerina Deposition; Docket 25188 Hearing Transcript at 605, ln. 25; 606, ln. 7.

<sup>272</sup> EPN Texas Arbitration Hearing Transcript at 503:11-21.

**B. ILECs Must Provide Nondiscriminatory Access to Dark Fiber Information and Network Neutral Provisioning of Unbundled Network Elements**

**1. The Commission's Loop Qualification rules governing nondiscriminatory access to underlying information regarding ILEC facilities should apply to dark fiber and other UNEs**

In the *Local Competition Order*, the Commission clarified that an ILEC has a duty to make available to requesting carriers general information indicating the location and technical characteristics of its network facilities.<sup>273</sup> The Commission recognized that without access to such information, competing carriers would be unable to make rational network deployment decisions and could be forced to make inefficient use of their own and ILEC facilities, with anti-competitive effects.<sup>274</sup> In the *Local Competition Order*, the Commission further addressed the ILECs' obligations to provide access to the tools they utilize to provision dark fiber and other services to requesting carriers. In particular, the Commission defined OSS as consisting of "pre-ordering, ordering, provisioning, maintenance and repair, and billing functions supported by an incumbent LEC's databases and information."<sup>275</sup> In defining the OSS UNE, the Commission chose to broadly classify OSS as anything that involves one or more of these five functions. In addition, in its *UNE Remand Order*, the Commission clarified that "OSS includes the manual, computerized, and automated systems, together with associated business processes and the up-to-date data maintained in those systems."<sup>276</sup>

---

<sup>273</sup> First Local Competition Order, at ¶ 205.

<sup>274</sup> *Id.*

<sup>275</sup> See 47 C.F.R. § 51.319(f).

<sup>276</sup> UNE Remand Order, at ¶ 425.

The Commission has given a broad scope to the ILECs' obligation to provide access to information on a non-discriminatory basis, explaining that, under its rules:

the relevant inquiry is not whether the retail arm of the incumbent has access to the underlying loop qualification information, but rather whether such information exists anywhere within the incumbent's back office and can be accessed by any of the incumbent LEC's personnel.<sup>277</sup>

Further, the Commission stated, an ILEC "may not filter or digest such information to provide only that information that is useful" for the provisioning of a particular type of service the incumbent chooses to offer."<sup>278</sup> Instead, the *UNE Remand Order* established that the ILEC "must provide access to the underlying loop qualification information contained in its engineering records, plant records, and other back office systems so that requesting carriers can make their own judgments about whether those loops are suitable for the services the requesting carriers seek to offer."<sup>279</sup> "To permit an incumbent LEC to preclude requesting carriers from obtaining information about the underlying capabilities of the loop plant in the same manner as the incumbent LEC's personnel would be contrary to the goals of the Act to promote innovation and deployment of new technologies by multiple parties."<sup>280</sup>

In the *Notice*, the Commission asks whether these principles should be expanded to the pre-ordering process for other UNEs. This is a critical issue for CLECs that utilize UNE dark fiber because "a requirement to provide unbundled access to dark fiber means little unless ILECs

---

<sup>277</sup> Id., at ¶ 430.

<sup>278</sup> UNE Remand Order, at ¶ 428.

<sup>279</sup> Id. at ¶ 428.

<sup>280</sup> Id., at ¶ 430 (emphasis added).

are required to tell CLECs where it resides and to allow CLECs an efficient means of connecting to it.”<sup>281</sup>

EPN’s experience in Texas is particularly illuminating. Under its current interconnection agreement, EPN has the ability to view SBC’s plant layout records and design work orders, essentially maps showing the location of fiber SBC has deployed in its loop or interoffice network. Combined with other information culled from its customers, EPN is able to determine when fiber facilities should be present and whether facility check responses it receives from SBC are in fact accurate. In addition, EPN can avoid having to guess whether SBC has deployed fiber to a customer EPN intends to serve because they have access to the raw data. As the Texas Commission observed “EPN is attempting to buy unbundled fiber and cannot reasonably do so without knowledge of where such fiber exists.”<sup>282</sup>

However, there are circumstances where SBC has not updated its maps and records to which EPN has access, leaving EPN without the ability to determine for itself whether fiber exists to serve a particular customer that wants to obtain service from EPN. For example, SBC employee Mr. Johnson testified that DWOs ( the work orders that instruct SBC’s outside plant technicians where to install the fiber cable) do not get posted to the PLRs (the permanent records that track the location of SBC’s network facilities) until “every part of the DWO is completed,” and even then, “it may take six months after that” and even up to a year.<sup>283</sup> In such a case, SBC will have access to fiber facilities and will be able to shield their existence from CLECs until SBC unilaterally deems the DWO “complete,” at which time it may (or may not) post it in the

---

<sup>281</sup> Joint Comments of NuVox, KMC et al at 78.

<sup>282</sup> 25188 Award at 140.

<sup>283</sup> Johnson Deposition, at 125, ln. 6; 126, ln. 24.

PLRs.<sup>284</sup> In fact, Mr. Johnson testified that it is not uncommon for service to be actually running over a circuit that was installed pursuant to a DWO, but the DWO had never been posted to the PLR.<sup>285</sup> EPN conducted discovery on this issue and obtained useful information that, as discussed elsewhere in these comments it is currently unable to share with the Commission.<sup>286</sup>

In these cases, EPN must submit a series of facility checks until it hits on the right combination of A and Z locations where fiber exists and is available for EPN's use. If EPN had access to all the information residing in the ILEC back office, as required under the Commission's rules for xDSL loop qualification, EPN would never need to "guess" whether fiber exists.

ILECs such as SBC employ systems like the Job Management Operating System, ("JMOS") that track progress on Outside Plant work activity. For example, if a technician completes the installation of a lateral from a manhole into a building that progress is recorded in JMOS. In turn, other SBC personnel can access JMOS to determine what progress has been made on a particular fiber placement. Using that information, SBC personnel can apprise customers with the most up to date and accurate information concerning facilities availability, information that is not available to CLECs.

Further, SBC personnel have unfettered access to databases and maps to serve their customers. In EPN's arbitration in Texas, current and former SBC access account managers that are responsible for selling special access service testified that they have direct access to SBC's

---

<sup>284</sup> Dark Fiber Comments, Ex. 9, Galvan Direct, at 16.

<sup>285</sup> Johnson Deposition, at 127, ln. 10-17.

<sup>286</sup> EPN obtained information from SBC during its arbitration in Texas. Under the Protective Order in that docket, EPA is prohibited from using such information outside of the distribution proceeding in Texas. EPN has attached a copy of the Protective Order as Attachment I to these comments.



databases that records the location and characteristics of all working circuits in SBC's local network, including unfiltered information on all CLEC circuits.<sup>287</sup> In addition, the account managers can cut and paste information directly from the Trunks Integrate Record keeping System, ("TIRKS") database into an e-mail and send the information to its customer. Using TIRKS, the SBC account manager can determine existing SONET configurations and the amount of capacity available on that system.<sup>288</sup> The account managers then provide that analysis to the customer.<sup>289</sup>

For this reason, the Commission's existing loop qualification rules should apply with equal force to other UNEs, especially dark fiber. "[W]ithout being able to learn where dark fiber is, CLECs cannot order it, rendering the Commission's rules an empty mandate."<sup>290</sup>

Most RBOCs rely on cumbersome processes to "subvert nondiscriminatory access to the information resident in their own systems and records and ultimately deny unbundled access to dark fiber loops."<sup>291</sup> Although the ILECs make self-serving claims that these processes are the same they use internally to determine whether facilities are available for its own use, EPN's experience finds the claims without any credibility, particularly with regards to SBC. For instance, SBC claims that when a CLEC orders dark fiber, its order is treated the same way SBC's internal request to determine availability for its customers are handled. The facts indicate otherwise. SBC denotes all CLEC requests with a "W" prefix that identify them as CLEC

---

<sup>287</sup> Cunningham deposition 51-53, provided as Attachment J.

<sup>288</sup> Docket 25188, Hearing Tr. at 192-194, (Waken Cross).

<sup>289</sup> Cunningham deposition at 68.

<sup>290</sup> Joint Comments of NuVox, KMC et al. at 78.

<sup>291</sup> Id. at 79.

requests.<sup>292</sup> Thus every SBC employee that handles the request knows it is a CLEC request, as opposed to a SBC Retail request.

SBC is apparently not the only ILEC that employs such discriminatory practices by denying CLECs access to pre-ordering OSS information regarding dark fiber. For example Verizon has “refused to assist [Conversent] in identifying where such [interoffice] dark fiber is routed.”<sup>293</sup> This requires Conversent and other CLECs to guess where the fiber is located, playing a game of “go fish” with Verizon.

This fact is borne out by EPN’s experience ordering and using dark fiber in Texas. Although EPN currently has an interconnection agreement with SBC in Texas that obligates SBC to provide EPN with “parity access to maps and data,”<sup>294</sup> SBC has refused to provide crucial types of maps and data. For example, although EPN is permitted to review SBC’s Plant Location Records, (“PLRs”) these maps are frequently out of date. Until EPN obtained an interim ruling that held otherwise, SBC refused to provide EPN access to Design Work Order (“DWO”) prints, which contain the fiber layout maps that are ultimately transferred to the PLRs.

This practice of discriminating against CLECs is borne out in statistics. In response to discovery requests SWBT indicated that for the year 2001 in Texas for CLECs other than EPN, it received 95 Dark fiber requests, 49 of which were rejected, for a rejection rate of 51.57%<sup>295</sup>.

---

<sup>292</sup> Johnson deposition at 87.

<sup>293</sup> Conversent comments Ex. 1, Graham Decl. ¶ 32

<sup>294</sup> Petition of Waller Creek Communications for Arbitration of an Interconnection Agreement Pursuant to Section 252 of the Telecommunications Act of 1996 with Southwestern Bell Telephone Company, Docket 17922, Complaint of Waller Creek Communications for Post-Interconnection Agreement Dispute Resolution with Southwestern Bell Telephone Company, Docket 20268, Revised Award at 4, TX PUC (June 22, 1999).

<sup>295</sup> Complaint and Request for Interim Ruling of El Paso Networks, LLC for Post-Interconnection Agreement Dispute Resolution with Southwestern Bell Telephone Company, Docket 25004, Petition of El Paso Networks, LLC for Arbitration of an Interconnection Agreement Pursuant to Section 252 of the

Even more stunning is the situation with DS3 loops. For DS3 loop requests, SWBT rejected 119 of 237 requests from CLECs other than EPN in Texas in the year 2001.<sup>296</sup> Thus, for CLECs the rejection rate amounted to 50.21%. In contrast SWBT received 2,738 request for DS3 Special access service and *did not reject a single request for lack of facilities*.<sup>297</sup>

The experience of CLECs in other states is consistent with the high rejection rate for dark fiber requests found in Texas. In New Hampshire, for example, Verizon rejected a phenomenal 90 out of 107 (84 percent) CLEC inquires for dark fiber between January 2000 and July 2001.<sup>298</sup> Likewise in Maine, between January 2000 and September 30, 2001, Verizon received a total of 134 CLEC dark fiber inquires and determined that dark fiber was no available in 100 of 134 instances (a staggering unavailability rate of 75 percent).<sup>299</sup>

The dark fiber numbers are instructive because unless the CLEC adopted EPN's existing agreement with SBC in Texas it did not have that same parity access to maps and data. For instance the T2A, which most Texas CLECs have adopted, does not contain similar rights of access. Thus CLECs, such as Heritage Technologies, find that their request for dark fiber under the T2A are routinely rejected for lack of facilities, as the CLEC seeks the dark fiber UNE in the

---

Telecommunications Act of 1996 with Southwestern Bell Telephone Company, Docket 25188, SWBT Response to EPN Non-Cost RFIs, RFI 1-3 at p. 10, March 20, 2002, TX PUC, provided as Attachment K, at p. 2.

<sup>296</sup> Id. SWBT Response to EPN Non-Cost RFIs, RFI 1-5 at p. 12, provided as Attachment K, at p. 3.

<sup>297</sup> Id. SWBT Response to EPN Non-Cost RFIs, SWBT Response to EPN Non-Cost RFIs, RFI 1-4 at p. 11, provided as Attachment K, at p. 2.

<sup>298</sup> *Verizon New Hampshire, Inc., d/b/a Verizon New Hampshire, Section 271 Compliance Filing*, Docket No. DT 01-151, Reply Declaration of CTC Communications Corp., at 7 (Nov. 27, 2001).

<sup>299</sup> *Inquiry Regarding the Entry of Verizon – Maine Into the InterLATA (Long Distance) Telephone Market Pursuant to Section 271 of the Telecommunications Act of 1996*, Docket No. 2000-849, Comments of CTC Communications Corp., at 22 (Feb. 15, 2002).

blind.<sup>300</sup> Heritage, for example, in order to obtain interoffice dark fiber under the T2A, submitted a series of 10 dark fiber inquiries over a span of approximately six weeks in order to determine how it could implement its network using UNE dark fiber.<sup>301</sup> When Heritage asked SWBT to provide the information that would allow Heritage to assess the viability of its plans, SWBT refused.<sup>302</sup> In refusing to provide this information, SBC consistently asserted that the location of its network facilities is proprietary and cannot be revealed to CLECs. In some cases, such as with Heritage, SBC will offer a confidentiality agreement that is so onerous the CLEC has no choice but to decline. For example, the confidentiality agreement in Heritage's case would have prohibited Heritage from using the information provided by SWBT in a complaint proceeding at the Texas PUC. Subsequently the Texas PUC has recognized that "EPN is attempting to buy unbundled fiber and cannot reasonably do so without knowledge of where such fiber exists."<sup>303</sup> The Arbitrators further found that there is "a distinction between facility information and proprietary customer information", and held that "[a]lthough security is a valid concern, the Arbitrators do not find that it justifies restricting CLEC access to network information."

## **2. ILECs Should Be Required to Provide Network Neutral UNE Provisioning**

What is important is that the Commission recognize that the system that is supposed to afford CLECs nondiscriminatory access to UNEs and information regarding the location of those UNEs is inherently biased against the CLEC. For example, SBC contends that its internal sales

---

<sup>300</sup> See Docket 25106, Complaint and Request for Interim Ruling of Heritage Technologies, at 5-8, TX PUC, filed Dec. 4, 2001, (Heritage filed numerous requests for interoffice fiber from SWBT in the Houston area).

<sup>301</sup> Id.

<sup>302</sup> Id. at 8.

forces use the same process as CLECs for locating available services and network elements that can be used to provide service. There are however, significant differences in how SBC employees use that system when serving CLEC customers. For instance, in SBC's system for responding to dark fiber and high capacity UNE requests, all inquiries or orders submitted by CLECs have a code that identifies them as such.<sup>304</sup> Thus every time EPN submits a request for a DS3 through the Local Service Center, every SBC employee that handles that request knows that the order is for a CLEC.

An additional problem is that some ILECs, including SBC, maintain a sales referral program for its engineering and network sales support personnel. Thus the very personnel that are responsible for "determining" whether facilities are available for a CLEC get financially rewarded when SBC makes the sale rather than the CLEC.

In contrast when SBC-ASI submits its orders everyone in SBC knows it is for ASI. ASI informs SBC's LEC affiliates in Texas, SWBT, that it needs DS3s. SWBT then proceeds to locate the facilities needed to serve ASI. If the facilities are not available, SWBT will actually deploy them. After the facilities have been deployed, SWBT informs ASI that it should process its request through normal channels now that facilities exist to service ASI's request, ensuring that ASI does not receive a "no facilities" rejection.<sup>305</sup>

Within SBC, it is also a routine practice that sales personnel dispense with the regular routine of submitting facility checks through NSS and instead go directly to the outside plant

---

<sup>303</sup> EPN Texas Arbitration Award at 41.

<sup>304</sup> Johnson Deposition at 101.

<sup>305</sup> Johnson deposition at 52.

engineer in order to determine whether facilities are available.<sup>306</sup> Such informal channels are not open to CLECs which must follow the strict rigor of submitting requests through the LSC so the ILEC can properly manage the CLEC order and control the flow of information to that CLEC.

The Dark Fiber Commenters suggest that the FCC take several steps in its new UNE rules to make sure that this overt discrimination does not continue, as it has a severe impact on the ability of CLECs to compete for high capacity services using UNEs in a meaningful manner.

While most ILECs have automated many DSL loop qualification functions, only one RBOC has done so for dark fiber.<sup>307</sup> Thus, the process remains inherently manual. Because it is a manual process, the FCC should specify that its existing OSS rules require ILECs to afford CLECs nondiscriminatory access to maps and data regarding the location and characteristics of dark fiber. The current lack of a specific rule requiring such access impedes a CLECs ability to locate dark fiber and allows the ILEC to “hide the ball,”<sup>308</sup> and force the CLEC to “guess” where fiber is located.<sup>309</sup> Information about where the UNEs are available and what facilities are available is essential to the proper functioning of the market.<sup>310</sup> At a minimum, the ILECs should be required to provide CLECs maps showing where fiber was deployed.<sup>311</sup>

Second, the FCC must further clarify that its OSS rules do not allow ILECs to systematically label CLEC orders as CLEC orders. To be truly nondiscriminatory, the ILEC personnel should not know whether the request is coming from a CLEC or from the ILEC’s retail

---

<sup>306</sup> Rossman Deposition at 77-78.

<sup>307</sup> Joint Comments of NuVox, KMC et al at 78.

<sup>308</sup> Id.

<sup>309</sup> Conversent comments, Graham Decl. ¶ 32.

<sup>310</sup> Docket 25188 Hearing Transcript at 358-359.

<sup>311</sup> Conversent comments, Graham Decl. ¶ 32.

organization, particularly when the task is identifying whether facilities are available. Only when the ILECs employees are "network neutral" will CLECs be assured of having its requests treated in a nondiscriminatory manner as required under the Act.

Under such a network neutral provisioning system the ILEC personnel that determine facility availability would not know whether the request was for a UNE or not. For instance a CLEC determination of fiber availability would be treated identical to an internal ILEC request to determine if fiber was available in order to deploy a new SONET system for an access customer.<sup>312</sup>

Not only does SBC not encourage its network departments to be network neutral, SBC encourages its network organizations to favor SBC retail and access sales and marketing organizations by offering sales commissions and incentives to its engineers.<sup>313</sup> This Commission should immediately require that the RBOCs establish network neutral provisioning so that the RBOC provisions CLEC orders for unbundled network elements on a parity basis with orders for the RBOCs' affiliates and non-affiliated retail and access customers. There is absolutely no reason for the RBOC engineers and technicians to know who will be paying for the circuit or fiber they are provisioning. Discriminatory provisioning should be eliminated once and for all.

---

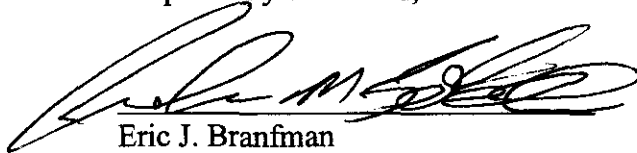
<sup>312</sup> At some point, when the CLEC orders the fiber and the ILEC cross connects the UNE to the CLEC collocation space the identity of the CLEC becomes known, however the fact remains that in the ordering stage, that whether it is a UNE order must be known, but in determining availability of network elements it need not be.

<sup>313</sup> Rossman Deposition at 45-46.

**V. CONCLUSION**

The Dark Fiber Commenters request that the Commission conclude this proceeding, in accordance with the recommendations herein, at the earliest possible date.

Respectfully submitted,



Eric J. Branfman  
Edward W. Kirsch  
Joshua M. Bobeck  
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP  
3000 K Street, N.W., Suite 300  
Washington, D.C. 20007  
(202) 424-7500 (Telephone)  
(202) 424-7643 (Facsimile)

Pamela Hintz  
Vice President of Legal and  
Regulatory Affairs  
CTC Communications Corp.  
360 Second Ave.  
Waltham, MA 025451  
781-466-1242 (Telephone)  
781-466-1306 (Facsimile)

Stephen W. Crawford  
General Counsel  
Peter Manias  
El Paso Networks, LLC  
1001 Louisiana Street  
Houston, TX 77002  
(713) 420-5896 (Telephone)  
(713) 420-4488 (Facsimile)

July 17, 2002



## CERTIFICATE OF SERVICE

I, Penny Jackson, a secretary in the law firm of SWIDLER BERLIN SHEREFF FRIEDMAN, LLP, certify that on this 17<sup>th</sup> day of July, 2002, service of a true and correct copy of the foregoing, **“REPLY COMMENTS”**, were made by First-Class U.S. mail, postage prepaid, to:

\*Jeffrey Carlisle  
Senior Deputy Bureau Chief  
Wireline Competition Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

\*Scott Bergman  
Wireline Competition Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

\*Matthew Brill  
Office of Commissioner Kathleen Abernathy  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

\*Daniel Gonzalez  
Office of Commissioner Kevin Martin  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

\*Jordan Goldstein  
Office of Commissioner Michael Copps  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

\*Kyle Dixon  
Office of Chairman Michael Powell  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

\*Jeremy Miller  
Wireline Competition Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

\*Tom Navin, Deputy Chief  
Wireline Competition Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Brad E. Mutschelknaus  
John J. Heitmann  
Stephanie A. Joyce  
Brett Heather Freedson  
Kelley Drye & Warren LLP  
1200 19<sup>th</sup> Street, NW  
5<sup>th</sup> Floor  
Washington, DC 20036

Scott Sawyer  
Conversent Communications, LLC  
222 Richmond Street, Suite 301  
Providence, RI 02903

John E. Benedict  
H. Richard Juhnke  
Jay C. Keithley  
Sprint Corporation  
401 9<sup>th</sup> Street, NW, Suite 400  
Washington, DC 20004

Mark C. Rosenblum  
Lawrence J. Lafaro  
Richard H. Rubin  
Teresa Marrero  
AT&T Corp.  
295 North Maple Avenue  
Basking Ridge, NJ 07920

Kevin M. Joseph  
Mary C. Albert  
Allegiance Telecom, Inc.  
1919 M Street, NW, Suite 420  
Washington, DC 20036

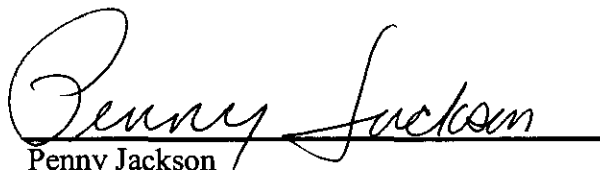
Lisa B. Smith  
Richard S. Whitt  
Henry G. Hultquist  
Kimberly Scardino  
WorldCom, Inc.  
1133 19<sup>th</sup> Street, NW  
Washington, DC 20036

Jeffry A. Brueggeman  
Christopher M. Heimann  
Jim Lamoureux  
Gary Phillips  
Paul K. Mancini  
SBC Communications Inc.  
1401 I Street, NW  
Washington, DC 20005

Michael E. Glover  
Edward Shakin  
Verizon  
1515 North Courthouse Road  
Suite 500  
Arlington, VA 22201-2909

Theodore R. Kingsley  
Richard M. Sbaratta  
Stephen L. Earnest  
Leah G. Cooper  
BellSouth Corporation  
Suite 4300  
675 West Peachtree Street, NE  
Atlanta, GA 30375-0001

Sharon J. Devine  
Craig Brown  
Qwest Communications International Inc.  
1020 19<sup>th</sup> Street, NW  
Washington, DC 20036

  
Penny Jackson  
July 17, 2002

\*Via Hand Delivery